

Original

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)
)
Implementation of the Satellite Home)
Viewer Improvement Act of 1999)
)
Retransmission Consent Issues)

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CS Docket No. 99-363

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To: The Commission

REPLY COMMENTS OF THE POST COMPANY

The Post Company ("Post"), licensee of Station KIFI-TV, Idaho Falls, Idaho, by its attorneys, hereby submits these Reply Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding¹ and in response to comments filed by various multichannel video programming distributors ("MVPDs") which urge the Commission to adopt broad rules to regulate all transmission negotiations and to establish a list of *per se* violations of the good faith negotiating requirement of broadcasters. Given the fact that both broadcasters and MVPDs have an economic incentive to enter into retransmission agreements in good faith, such a regulatory scheme is unnecessary and would result in needless litigation and regulatory delay. Moreover, limiting the ability of broadcasters to negotiate with MVPDs will have a particularly adverse effect on small broadcasters like KIFI-TV. For these reasons, Post urges the Commission to refrain from adopting the restrictive regulations proposed by the MVPDs.

¹ The Notice of Proposed Rulemaking ("NPRM") was released on December 22, 1999. Reply comments in response to the NPRM are to be filed on or before January 21, 2000. Therefore, these reply comments are timely filed.

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In the Satellite Home Viewer Improvement Act (“SHVIA”),² Congress amended Section 325 of the Communications Act and directed the Commission to “revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent.”³ In its NPRM, the Commission specifically requested comments on the “good faith” negotiation provisions of the Act. While the Act requires the Commission to revise its regulations regarding the right of broadcast stations to grant retransmission consent, it does not grant the FCC the authority to adopt an extensive regulatory scheme to define “good faith.” In fact, the Act expressly states that the Commission cannot find a lack of “good faith” if different retransmission consent agreements contain different terms and conditions based on “competitive marketplace considerations.”⁴ Given the fact that Congress has not mandated extensive regulation in this area, the Commission should refrain from creating an unnecessary regulatory scheme concerning the negotiation of retransmission consent agreements.

Instead, the Commission should adopt a procedure whereby it would review negotiations on a case-by-case basis, should the need arise. The Commission should intervene only when necessary. This will rarely ever occur because marketplace conditions will resolve most disputes. The marketplace considerations that will do so are not easily subject to predefinition; they will change depending on the circumstances. Clearly the “competitive marketplace issues” involved in a negotiation between KIFI-TV and an MVPD in Idaho Falls, Idaho would be very

² Act of Nov. 29, 1999, PL 106-113, §1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999, Title I of the Intellectual Property and Communications Omnibus reform Act of 1999).

³ 47 U.S.C. § 325(b)(3)(C)(ii).

⁴ Id.

different than those concerning a broadcaster and an MVPD in a larger market. If the Commission were to attempt to specifically define “competitive marketplace issues,” it would be forced to become involved in reviewing the terms and conditions of every retransmission consent agreement. “Competitive marketplace conditions” are inherently factual considerations and must be decided by a case-by-case analysis and not through predetermined governmental regulation.

In contrast to this hands-off approach, the comments of several MVPDs propose that the Commission adopt an extensive list of *per se* violations of the “good faith” negotiating requirement.⁵ These proposed restrictions include, but are not limited to, the following prohibitions: requests for consideration; conditioning retransmission of a station’s analog signal on the requirement that a MVPD also carry the station’s digital signal; entering into short-term agreements; failing to offer one MVPD the best deal offered by another MVPD; requesting specific channel positioning; and, conditioning network exclusivity within a station’s own market.⁶

This list of proposed *per se* violations is so extensive and one-sided as to render any notion of equality at the bargaining table meaningless. In fact, the exhaustive list of prohibitions advocated by the MVPDs are exactly the types of marketplace considerations that should be part of the negotiation process. Without the ability to negotiate for these things prior to granting retransmission consent, there is little or nothing for the broadcaster to ask for. If the Commission were to adopt these rules, broadcasters would have little bargaining power and would essentially

⁵ See generally the comments of DIRECTV, Inc., Echostar Satellite Corporation and The Satellite Broadcasting and Communications Association.

⁶ Id.

be prohibited from receiving any consideration in exchange for retransmission consent. As a result, the Commission must reject this one-sided approach to regulating the negotiation of retransmission consent agreements.

As the comments that have been filed thus far in this proceeding demonstrate, not only would the proposed regulations be overly restrictive, it is clear that extensive Commission regulation in the retransmission negotiation process is unnecessary. Both MVPDs and broadcast stations have considerable marketplace incentives to reach program retransmission agreements. MVPDs have a powerful incentive to negotiate with broadcasters in order to provide local broadcast programming. According to DIRECTV in its comments, the inability to provide local programming was “one of the most significant factors that hindered DIRECTV from offering a competitive alternative to cable....”⁷ As a result of the SHVIA, satellite services are able to provide local-to-local service allowing the MVPDs to deliver local broadcast channels to their customers. This ability to provide local channels provides MVPDs with considerable business incentives to enter into retransmission agreements with broadcast stations.

Similarly, broadcasters have a strong marketplace incentive to negotiate good faith retransmission consent agreements with MVPDs. As the National Association of Broadcasters points out in its comments, “the incentive for stations to be carried is that they make money selling commercial time to advertisers and their revenues depend on the number of viewers they reach. Since MVPDs offer a convenient way for viewers to receive their local stations along with nonbroadcast channels, stations naturally desire to have their signals included among the

⁷ DIRECTV Comments at 1.

MVPDs offerings.”⁸ This is especially true for a small station like KIFI-TV, which clearly has a fundamental interest in having its broadcasts disseminated to as wide an audience as possible.

While the restrictions proposed by the MVPDs would adversely affect all broadcasters, they would have a particularly adverse effect on small and medium sized broadcasters. Adoption of an extensive list of *per se* rules would hamper the already limited bargaining position of small broadcasters *vis a vis* the MVPDs. As a small station in the Idaho Falls/Pocatello DMA (Rank 164), KIFI-TV and similarly situated stations have fewer viewers and receive less revenue than do stations in larger markets. Therefore, in order to allow smaller sized stations to bargain effectively with MVPDs when negotiating retransmission consent agreements, the Commission must not deprive these stations of negotiating opportunities. If the *per se* violations are adopted by the Commission, the ability of small stations will be severely limited leaving these broadcasters at the mercy of the MVPDs. Therefore, the Commission must reject this one-sided approach advocated by the MVPDs.

Conclusion

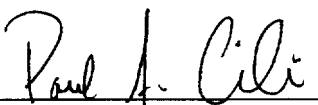
The goal of the Satellite Home Viewer Act is to promote competition in the video programming delivery market. Because both broadcasters and MVPDs have significant business incentives to negotiate retransmission consent agreements, it is unnecessary for the Commission to adopt a complicated regulatory scheme that would usurp the freedom of the competitive marketplace. Instead of adopting an extensive list of *per se* violations which would be particularly harmful to the retransmission consent rights of small broadcasters, the Commission

⁸ National Association of Broadcasters Comments at 1-2.

should promulgate a few objective and simple rules designed to ensure "good faith" on the part of broadcasters. By limiting its regulatory scheme to a case-by-case review, the Commission will avoid counterproductive over-regulation at the expense of broadcasters.

Respectfully submitted,

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